No. 78-369

In the Supreme Court of the United States

OCTOBER TERM, 1978

MAURICE SHANNON, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

WILLIAM KANTER
MARK H. GALLANT
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 577 F. 2d 854. The opinion of the district court (Pet. App. B1-B5) is reported at 433 F. Supp. 249.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1978. The petition for a writ of certiorari was filed on September 1, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Civil Rights Attorney's Fees Awards Act of 1976 authorizes an award of attorneys' fees against the United States.

STATEMENT

Petitioners, who are residents, businessmen and property owners in the East Poplar area of Philadelphia, requested the district court to enjoin the Department of Housing and Urban Development (HUD) from financing a housing project in that area. They alleged that the project would violate various civil rights acts.[1] The district court dismissed the suit for lack of jurisdiction and failure to state a claim upon which relief could be granted (305 F. Supp. 205), but the Third Circuit reversed. 436 F. 2d 809. The court of appeals held that HUD must suspend funding the project pending determination whether HUD could lawfully provide financial assistance. On remand to the agency, HUD found that federal financing of the project was barred under Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968. 387 F. Supp. 5, 6. The parties later agreed to the entry of a consent judgment settling the litigation. 409 F. Supp. 1189, 1190.

In July 1975 petitioners unsuccessfully sought an award of attorneys' fees, relying on Section 812(c) of Title VIII, 42 U.S.C. 3612(c).[2] After Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976 ("the Act"), 42 U.S.C. 1988, petitioners again moved for an award of

[1]Petitioners alleged violations of Section 105(d) of the Housing Act of 1949, 42 U.S.C. 1455(d); Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*; and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*

[2]28 U.S.C. 2412 proscribes awards of attorneys' fees against the federal government "[e]xcept as otherwise specifically provided by statute." The district court held that 42 U.S.C. 3612(c) is not such an exception. 409 F. Supp. 1189. This ruling was not appealed and is not in issue here.

attorneys' fees.[3] The district court rejected petitioners' renewed motion because the new Act does not "expressly provid[e]" for an award of attorneys' fees against the federal sovereign, as required by 28 U.S.C. 2412 and this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 267-268 (1975) (Pet. App. B1-B5). The court of appeals affirmed, stating that "the legislative history of the Act convinces us that Congress did not contemplate a waiver of sovereign immunity in passing the Act, with the exception of the clause dealing with Internal Revenue suits" (Pet. App. A4).

ARGUMENT

Petitioners contend that the Civil Rights Attorney's Fees Awards Act of 1976 authorizes the award of attorneys' fees against the federal government. The Act, however, does not expressly waive sovereign immunity, and its legislative history demonstrates that waiver was not intended. There is no conflict among the courts of appeals on this question and, consequently, review by this Court is not warranted.

It is well established that waivers of federal sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *King*, 395 U.S. 1, 4 (1969). This policy against implied waivers of sovereign immunity is particularly relevant to awards of attorneys' fees because Congress has explicitly declared that the United States is not liable for such awards "[e]xcept as otherwise specifically provided by statute." 28 U.S.C. 2412; see

[3]Respondents opposed this motion on the merits but did not contend that it was untimely or that the district court abused its discretion under Fed. R. Civ. P. 60(b) in entertaining the motion.

Alyeska Pipeline Service Co. v. *Wilderness Society*, *supra*, 421 U.S. at 267-268. The Act does not unequivocally or specifically subject the federal government to awards of attorneys' fees, and the court of appeals therefore correctly held that such awards are not available. Accord, *Southeast Legal Defense Group* v. *Adams*, 436 F. Supp. 891, 893 (D. Ore. 1977); contra, *Andrulis* v. *United States*, No. 77-1936 (D. D.C. June 12, 1978), appeal docketed, No. 78-2039 (D.C. Cir. Oct. 20, 1978).[4]

The portion of the Act on which petitioners rely provides only that "[i]n any action or proceeding to enforce a provision of * * * Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee as part of the costs." 42 U.S.C. 1988. This language does not mention awards against the United States, and it does not authorize awards by necessary implication.[5] It may be compared with the statutes concerning attorneys' fees that

[4]Petitioners suggest (Pet. 11-12) that the Department of Justice has taken a position contrary to the one espoused here in several recent actions. This is incorrect. In both *Women's Equality Action League* v. *Califano*, Civ. No. 74-1720 (D. D.C. May 3, 1978), and *Adams* v. *Califano*, Civ. No. 3095-70 (D. D.C. May 3, 1978), the government acquiesced in an award of attorneys' fees that was explicitly authorized by 20 U.S.C. 1617; the cases did not require an interpretation of the statute involved here. *NAACP* v. *Bell*, No. 78-1639 (D.C. Cir. filed July 10, 1978), another case upon which petitioners rely, is pending on the government's appeal. And, as the text indicates, *Andrulis* v. *United States*, which held that the Act authorizes the award of attorneys' fees against the United States, is similarly pending on the government's appeal.

[5]A statute might authorize awards of attorneys' fees against the United States by necessary implication if the United States were the only possible defendant in the suits mentioned in the fees statute. That is one of the rationales on which the Act was held to authorize awards of fees against the states. See *Hutto* v. *Finney*, No. 76-1660 (June 23, 1978). But the United States is not a necessary defendant, and indeed may not even be a proper defendant, in a suit to enforce

were cited by this Court in *Alyeska* as examples of express congressional waivers of sovereign immunity; these statutes explicitly state that awards against the federal government are permissible. 421 U.S. at 268. For example, Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(b), provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person." See also, *e.g.*, Privacy Act of 1974, 5 U.S.C. 552a(g)(2)(B) ("The court may assess against the United States reasonable attorney fees * * *"); Consumer Product Safety Act, 15 U.S.C. 2059 (e)(4), 2060(c) ("attorneys' fees may be awarded against the United States * * *"); Title III of the Civil Rights Act of 1964, 42 U.S.C. 2000b-1 ("United States shall be liable for costs, including a reasonable attorney's fee * * *").

The internal structure of the Act further demonstrates Congress' intent. The Act was amended at the eleventh hour to allow awards of attorneys' fees out of the federal treasury in tax cases brought by the United States in bad faith. See *Aparacor, Inc.* v. *United States*, 571 F. 2d 552 (Ct. Cl. 1978); 122 Cong. Rec. S17049 (daily ed. Sept. 29, 1976) (remarks of Sen. Allen); 122 Cong. Rec. S17050 (daily ed. Sept 29, 1976) (remarks of Sen. Tunney); 122 Cong. Rec. S17050-S17051 (daily ed. Sept. 29, 1976) (remarks of Sen. Kennedy). Congress must have recognized that the bill did not generally authorize awards of fees against the United States, or it would not have felt the need to insert such an explicit authorization with regard to tax cases. The portion of the Act explicitly authorizing fees against the United States in certain tax cases

Title VI. See Mr. Justice Stevens' opinion in *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978), slip op. 12 n.26.

demonstrates that such awards are not authorized in the other categories of cases mentioned by the Act. Cf. *Ford* v. *United States*, 273 U.S. 593, 611 (1927).

The legislative history of the Act also demonstrates that Congress did not intend to subject the federal fisc to awards of attorneys' fees under this provision. Both the House and Senate Reports accompanying the Act specifically stated that the government would incur no additional costs as a result of this legislation. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 7 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 9-10 (1976).[6] Similarly, the relevant legislative debates are replete with indications that Congress affirmatively elected not to create a "startling new remedy" against the federal sovereign. *E.g.*, 122 Cong. Rec. S16431 (daily ed. Sept. 22, 1976) (remarks of Sen. Hathaway); 122 Cong. Rec. S17052 (daily ed. Sept. 29, 1976) (remarks of Sen. Abourezk); 122 Cong. Rec. S16251 (daily ed. Sept. 21, 1976) (remarks of Sen. Kennedy); 122 Cong. Rec. S16490 (daily ed. Sept. 23, 1976) (letter from Rep. Rodino to Sen. Kennedy). The Senate rejected an amendment, offered by Senator Helms of North Carolina, that would have imposed the cost of attorneys' fees on the federal government. See 122 Cong. Rec. S16257-S16259 (daily ed. Sept. 21, 1976) (exchange of Sen. Helms and Sen. Mathias); 122 Cong. Rec. S17053 (daily ed. Sept. 29, 1976) (remarks of Sen. Morgan); 122 Cong. Rec. S16260 (daily ed. Sept. 21, 1976) (letter from Assistant Attorney General Uhlmann read by Sen. Mathias). Finally, on still another occasion the Senate

[6]Because the amendment authorizing fees in tax cases was added as a last-minute compromise, the legislative reports and early debates not reflect the amendment's potential costs to the federal government. Rep. Drinan, the floor manager of the bill in the House, commented that, in contrast to the original bill, "the [tax] amendment might involve an expense to the United States. However, since awards of counsel fees under that amendment will occur only in the special

rejected a second Helms' amendment that would have "afford[ed] protection to financially pressed State and local governments by including them within the bill's exemption from liability granted to the Government of the United States." 122 Cong. Rec. S16431 (daily ed. Sept. 22, 1976) (remarks of Sen. Helms); see also *id.* at S16432.[7]

Petitioners' further contention (Pet. 5-7) that the court of appeals' decision here conflicts with *Hutto* v. *Finney*, No. 76-1660 (June 23, 1978), is also incorrect. *Hutto* relied on unequivocal legislative history, and the civil rights acts' primary focus on state action, in holding that the Act authorized attorneys' fees awards against the States. Slip op. 13-15. The legislative history is equally explicit that Congress did not intend to authorize awards of fees against the United States. See pages 6-7, *supra*. The decisions thus are quite consistent.[8]

circumstances I have described, it is fair to say that the total costs to the Government for fiscal year 1977 would be negligible." 122 Cong. Rec. H12159 (daily ed. Oct. 1, 1976).

[7]Petitioners rely (Pet. 9-10) on some interchanges between members of the House immediately preceding the House vote on the amended bill. 122 Cong. Rec. H12163-H12164 (daily ed. Oct. 1, 1976). But the comments of Rep. Railsback, who was confused by the effect of the tax amendment, do not support petitioners' position. Even Rep. Railsback thought only that attorneys' fees could be awarded against the United States as plaintiff; here, of course, the United States was a defendant. In any event, Rep. Drinan corrected Rep. Railsback's misunderstanding of the tax amendment. 122 Cong. Rec. H12164 (daily ed. Oct. 1, 1976). Petitioners' invocation (Pet. 6-7) of the legislative history of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 777, is simply irrelevant.

[8]Petitioners also contend (Pet. 12-14) that Congress impliedly waived the prohibition against attorneys' fees found in 28 U.S.C. 2412 by amending the Administrative Procedure Act, 5 U.S.C. 702, shortly after enacting the Civil Rights Attorney's fees Awards Act of 1976. See Pub. L. No. 94-574, 90 Stat. 2721. This contention was

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

WILLIAM KANTER
MARK H. GALLANT
Attorneys

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not made below and cannot be raised in this Court for the first time. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970). In any event, there is no support for petitioners' position in either the legislative history or the language of the amendment. In conjunction with a parallel amendment of 28 U.S.C. 1331(a), the Administrative Procedure Act was amended for the narrow purpose of "withdrawing the defense of sovereign immunity in actions [against federal agencies] seeking relief *other than money damages* * * *." H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 4 (1976) (emphasis added). The amendment itself provides that "[n]othing herein (1) affects other limitations on * * * the power or duty of the court to * * * deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." Pub. L. No. 94-574, Section 702, 90 Stat. 2721. Accordingly, petitioners' argument that this legislation repealed the express provisions of Section 2412 to allow an award of money (attorney's fees) is wrong.

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